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No. 79-1764

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,
Petitioner
v.
JOYCE ANN BURDINE,
Respondent

On Writ of Certiorari To the
United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Defendant in a Title VII case, in articulating a legitimate, nondiscriminatory reason for an employment decision, must prove the reason by legally sufficient evidence or whether it must merely state a legitimate reason for its decision, even though such reason is fictitious and unsupported by the evidence.

2. Whether Respondent Burdine proved her charge of sex descrimination regarding the male, Walz, by a preponderance of the evidence regardless of of any error the Court of Appeals may have committed.

3. Whether the Court of Appeals may make an independent review of a finding of nondiscrimination by the trial Court or whether it must follow the clearly erroneous standard.

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STATEMENT OF THE CASE

Respondent generally accepts Petitioner's rendition of the facts but would add and clarify as follows:

Respondent had several years of experience in manpower programs while Walz had very little previous experience. (Pl. Ex. XIV; Tr. p. 28)

Respondent was not given a promotion or increase in pay from the period between November 1972 and April 1973 although she was given additional responsibilities and duties. However, Malone was given an increase in pay for "increased responsibilities and work load." (Pl. Ex. XII).

Respondent clearly expressed her desire, both orally and in writing, to remain in the program after the reorganization. (Pl. Ex. II i,k,s; Tr. Pp 11-13).

The Department of Labor made no requirements as to who the new personnel in the program should be. (Pl. Ex. IIt; Tr. P. 94).

Respondent was never interviewed for the Project Director position, or for any other position to be created after the reorganization. (Tr. Pp. 105,109).

Although the agency director, Fuller, testified that he believed that Respondent was responsible for inadequacies in the program and dissension among staff members, absolutely no evidence was introduced to support this assertion. In fact, as the Court of Appeals noted, Burdine v. Texas Department of Community Affairs, 608 F.2d 563, 568, Ft.10 (5th Cir. 1979)., the problems with the PSC staff predated Respondent's assumption of the Project Director's duties. At least one of the two persons terminated along with Burdine had caused the former Project Director, Nealy, considerable difficulties and Nealy expressed this concern in a memorandum to Fuller. Burdine later encountered the same problems with this employee and detailed them in a memo to Malone (Pl. Ex. XVI and IIf).

SUMMARY OF ARGUMENT

1. TDCA did not articulate legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz.

2. Even if TDCA articulated legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz, Burdine successfully rebutted such reasons, proved them to be pretextual and prevailed by a preponderance of the evidence.

3. The Court of Appeals is not bound by the clearly erroneous test of Rule, 52(a), F.R.C.P., and may make an independent review of the record to determine if discrimination occurred; however, the findings of the District Court were clearly erroneous.

ARGUMENT

I.

The trial court made no express finding as to whether a prima facie case of discrimination was established using the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, the Court of Appeals found that a prima facie case was proven and TDCA has not challenged this finding. TDCA agrees that, under the McDonnell Douglas test, once a prima facie case is established, the burden then shifts to the employer to "articulate a legitimate, nondiscriminatory reason" for its conduct. However, TDCA takes issue with the Court of Appeals concerning amount of proof necessary by the employer in articulating this legitimate, nondiscriminatory reason. The Fifth Circuit has clearly held prior to the instant case that the employer must prove a legitimate, nondiscriminatory reason by a preponderance of the evidence, and that "articulate" means to prove by legally sufficient evidence. Turner v. Texas Instruments, 555 F.2d 1251, 1255 (5th Cir. 1977). If

the employee meets this burden, the burden then shifts back to the Plaintiff to show that such reason(s) was merely pretextual. TDCA asserts that this standard as set forth here and in Turner is in conflict with this Court's rulings in Furnco Construction Company v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). TDCA contends that it is only necessary for the employer to state a legitimate, nondiscriminatory reason for its conduct, regardless of whether there is any evidence to support it.

Here, the Court of Appeals spoke directly to this alleged conflict and rejected it. The Court of Appeals stated that Sweeney merely held that an employer is not required to prove the absence of a discriminatory motive; however, this does not mean that no evidence other than the bald assertion of a reason by the employer is sufficient to rebut the prima facie case. The Court of Appeals stated in Turner that:

> "To rule otherwise would unduly limit a Plaintiff's opportunity to respond to an employer's articulation of reasons. If an employer need only articulate - not prove - a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions ... and the Plaintiff would find himself attempting to prove that a reason without factual foundation - presumed true - was a pretext for discrimination... We would not act consistently with our national policy in favor of eliminating racial discrimination in employment if we did not allow the Plaintiff to challenge the factual validity of an employer's reasons offered to rebut a Plaintiff's prima facie case." Id at 1255-56.

This standard set forth by the Fifth Circuit has since been followed by the D.C. Circuit in Williams v. Bell, 587 F.2d 1240, 1246 (D.C. Cir. 1978), by the Tenth Circuit in Higgins v. Gates Rubber Company, 578 F.2d 281, 284 (10th Cir. 1978), and again by the Fifth Circuit in Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025,

1030 (5th Cir. 1980). Burdine respectfully submits that the cases cited by TDCA and in the employer's amicus curiae brief are not, as the briefs allege, supportive of TDCA's contentions. In Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), decided after Sweeney, the Court followed Sweeney, but stated that the employer's defense

> "must be sufficient, on its face, to 'rebut' or 'dispel' the inference of discrimination that arises from proof of the prima facie case ... A passing reference by just one of many witnesses to some deficiency in the plaintiff's job rating, for example, would be insufficient. Nor would it be good enough to offer vague, general averments of good faith -a plaintiff cannot be expected to disprove a defendant's reasons unless they have been articulated with some specificity."

This Court's holdings in Furnco and Sweeney make the same distinction as did the Court of Appeals between "articulating (or proving) some legitimate, nondiscriminatory reason" for the conduct of the employer and in proving absence of a discriminatory motive. In Furnco, Supra, S.Ct. R. at 2950, this Court stated that "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." In Sweeney, the Court of Appeals stated that "in requiring the Defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence." On review, this Court made the distinction, as did the Court of Appeals here, between articulating some legitimate, nondiscriminatory reason and proving absence of discriminatory motive. As the Court of Appeals held here, this distinction is not relevant in this case since the employer was not required to prove absence of discriminatory motive but merely to articulate a legitimate, nondiscriminatory reason for its conduct by legally sufficient proof. Obviously, to a large extent,

when the employer articulates or proves a legitimate, nondiscriminatory reason for its conduct it is also eliminating discriminatory motive or intent unless the Plaintiff is able to submit other credible evidence rebutting this presumption. However. the real question here is not whether the employer must prove absence of discriminatory motive but what quality of evidence is required to be presented.

In applying the standard here, the Court of Appeals found that regarding the transfer of the male, Watts, the employer had articulated a legitimate, nondiscriminatory reason in that Watts was shown to have been better qualified for the job than Burdine and that Burdine had failed to show that this reason was pretextual. However, regarding the retention of Walz and termination of Burdine, the Court held that the employer had simply made bald assertions that were unsupported by evidence and contrary to the other evidence to the effect that he considered the male qualified and that he followed the recommendations of others. No comparative factual data of qualifications and performance were introduced and no objective criteria for the jobs were stated. In fact, the other evidence clearly rebutted the employer's testimony. Concerning the "troublemaker" label, as the Court of Appeals stated, no evidence was ever introduced to support this charge and, in fact, the problems in the agency of a recalcitrant staff predated Respondent's job, as evidenced by a memo from her former supervisor. (Burdine, supra at 568, Ft. 10; Pl. Ex. XVI).

Therefore, proof of nonreliance on a discriminatory motive was not required in this case. The Petitioner was never able to articulate a legitimate, nondiscriminatory reason for its termination of Burdine and retention of Walz. The mere assertions that Burdine was a troublemaker and that she was responsible for deficiencies in the PSC program, even if proven to be true, which they were not, were not legitimate, nondiscriminatory reasons since no comparative data of male employees were

introduced by testimony or otherwise. Assuming arguendo that Burdine was a troublemaker and partially responsible for deficiencies in the PSC program, these reasons alone could not be considered nondiscriminatory unless the employer also showed, by testimony or otherwise, that the male, Walz, was not a troublemaker or was not partially responsible for the program deficiencies. No such showing was made in this regard. Further, the assertion by TDCA that to require the employer to prove reliance on a legitimate, nondiscriminatory reason is the same as requiring proof of absence of a discriminatory motive is simply incorrect. For example, reliance on a legitimate, nondiscriminatory reason, such as comparative qualifications or treatment, might be shown by the employer. The burden would then shift to the Plaintiff to show that this reason was merely a pretext and that another illegitimate reason was the basis for the employer's conduct. Thus, the burden would be on the Plaintiff, as it should be, to prove discrimination by a preponderance of the evidence. The employer's proof of reliance on qualifications would be, in effect, an affirmative defense that would have to be rebutted by the Plaintiff. The employer would not be required to prove absence of a disciminatory motive. Here, the Court of Appeals merely held that the employer had not articulated a legitimate, nondiscriminatory reason for its actions. To hold otherwise, as the Court of Appeals noted in Turner, would place the Plaintiff in the strange position of having to prove that legitimate but fictitious reasons unsupported by the evidence were not the real reasons for the employer's conduct. Respondent respectfully submits that such a requirement is not contemplated by Title VII or this Court.

II.

Assuming arguendo that the Court of Appeals committed error in this case in apportioning and quantifying the burden of proof, its decision should nonetheless be affirmed because Burdine successfully

rebutted any stated legitimate, nondiscriminatory reasons for the employer's conduct, proved them to be pretextual and established her claims by a preponderance of the evidence. TDCA in its brief states that the legitimate nondiscriminatory reasons for the employer's actions were: (1) lack of documentation of expenditures; (2) payments made on expired contracts; (3) inaccurate expenditure accruals; (4) inaccurate enrollee certifications; (5) unqualified enrollees being allowed into programs, and (6) that Burdine was partially responsible for some dissension in the program. These allegations deserve comment.

The first five allegations against Burdine were testified about by E. B. Fuller, Executive Director of TDCA. Fuller is the person responsible for terminating Burdine and promoting the male, Walz. Actually these charges were derived by Fuller from a letter written to him by Charles E. Johnson, Contracting Officer of the United States Department of Labor (Pl. Ex. II)[1]. A reading of this letter shows that Burdine was in fact a member of the review team that discovered these and other deficiencies. Further, the impact of the letter is that, if any particular person could be blamed for the problems, it was Fuller himself and not Burdine. The required changes to the program included the hiring of a Project Director with complete authority to administer the program (emphasis added), appointment of a competent and qualified fiscal officer, a complete reorganization of the PSC staff and fiscal control under the direction of a Project Director. Other changes were required. Some of these suggested changes had already been urged by Burdine herself. (Pl. Ex. IIf).

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[1] All Exhibits were introduced into evidence pursuant to the Pre-Trial Order.

Concerning the allegations of dissension, again, Fuller could only make vague allegations of this nature. As the evidence shows and as the Court of Appeals found, any friction in the division predated Burdine's assumption of increased duties and had been outlined much earlier to Fuller by the former Project Director (Pl. Ex. XVI) and, later, by Burdine to her supervisor, Malone (Pl. Ex. IIf). Burdine, supra at 568. It is obvious, as the Court of Appeals found, Fuller himself deserved much of the blame for any friction in the division and he was simply attempting to make Burdine share this blame. No other evidence of any kind was introduced by TDCA to substantiate Fuller's allegations and Fuller was unable to state how Burdine was at fault. (Tr. Pp. 96-101).

The bald assertions made by the employer here do not approach the standard of evidence produced by the employer in Sweeney. The employer in Sweeney showed that another female took Sweeney's desired slot and that her unfavorable recommendation came from another woman. Sweeney, supra at 172. Further, the employer showed that there were also highly qualified males who had remained in the lower ranks of employment longer than Sweeney, that there were other males who were also not promoted on their first attempts and that other males also encountered difficulties in reaching the level of professor. Sweeney, supra at 178-179. Thus, comparative data of the sort lacking in this case, and required by the Court of Appeals, was present in Sweeney.

Other evidence in the record relied on by the Court of Appeals further enforces Burdine's contentions. The male Walz had been supervised and trained by Burdine (Pl. Ex. II b,e, Tr. Pp. 7, 9, 28). Walz had less experience in the manpower area and less seniority in the agency. (Pl. Ex. XIV; D. Ex. I). Burdine's qualifications were attested to by three other persons, including the former male Project Director (Tr. Pp. 57-61, 52-55, 62-66). And, although Fuller decried seniority and experience as a factor in retaining Walz and firing Burdine (Tr. P. 107), he relied on

these same factors in the transfer from another division of a new male Project Director (Tr. P. 108). Further, as noted by the Court of Appeals, there was no reliance on objective job criteria or comparison of qualifications in the job selection process. Burdine, supra at 568. Also see Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

Thus, the actual effect of the ruling of the Court of Appeals is that the employer's unsupported allegations were simply not credible evidence worthy of belief in light of the total evidence produced at the trial. Respondent submits that, in this case, whether the employer was required by the Court of Appeals to justify its employment decision by a preponderance of the evidence rather than by a lesser standard of proof is unimportant since Burdine prevailed on the whole by a preponderance of the evidence. The effect of its judgment was that, as in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), but for her sex, female, Burdine would have been retained rather than terminated.

Thus, Respondent Burdine submits that the evidence clearly establishes her right to recover on the question of her termination and the promotion of Walz regardless of any error that may have been committed by the Court of Appeals. Burdine respectfully submits that she is entitled to recover on the merits of the case, regardless of the standard of proof used, that this Honorable Court should affirm the judgment of the Court of Appeals.

III.

TDCA asserts that the Court of Appeals erred in making an independent review of the record to determine if discrimination had occurred rather than applying the clearly erroneous standard. The Fifth Circuit followed the rule first set down by it in Causey v. Ford Motor Company, 516 F.2d 416 (5th Cir. 1975) and later followed in East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1977). In Causey, the Court discussed the distinction between

application of the clearly erroneous test of Rule 52(a), Federal Rules of Civil Procedure, to findings of subsidary facts and to findings of ultimate facts. The Court held that the finding of a subsidiary fact is the determination of an evidentiary or primary fact while the finding of an ultimate fact "may involve the very basis in which judgment of fallible evidence is to be made." Causey at 420 citing Baumgartner v. United States, 1944, 322 U.S. 665,671, 64 S. Ct. 1240, 1244, 8 L. Ed. 1525, 1529. Among examples, the Court stated, are findings such as patent infringements and capital gains for tax purposes. The Court then held that, although discrimination vel non is essentially a question of fact, it is at the same time the ultimate issue for resolution of the case as proscribed by 42 U.S.C.A. Sec. 2000 e-2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact and may be determined by an independent review of the record free and clear of the clearly erroneous standard. The Seventh Circuit also adopted this standard in Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), cert. denied, 443 U.S. 919 (1977).

In East, supra, the Court determined that the lower Court had not made a determination according to the McDonnell Douglas standard and that, pursuant to Causey, an independent review of the record was necessary. The same situation is applicable in the instant case and the Court of Appeals proceeded, as in Causey and East, to make an independent review of the record.

Although TDCA acknowledged the efficacy of Causey and East, it argues that this reasoning should not apply here since the instant case is one involving disparate treatment rather than disparate impact. Respondent submits that this distinction does not exist but that, even if it did, it is a distinction lacking materiality. Both Causey and East involved questions of disparate treatment and disparate impact. Ms. Causey's allegations included failure to hire her prior to hiring of males and failing to re-hire her prior to re-hiring of males. Ms. East also complained of failure to hire because of disparate

treatment with males. Necessary comparisons were made in both cases with the treatment afforded certain male employees. Therefore, it is clear that TDCA's distinction is not valid and that the Court of Appeals adopted the proper standard of review. Further whether discrimination may be alleged on the basis of disparate impact or disparate treatment, it is in both cases a question of ultimate fact.

TDCA urges the adoption of the clearly erroneous standard as applied by the First Circuit in Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979) cert. denied __ U.S. __, 100 S. Ct. 733 (1980). There, the Court rejected the Causey standard. Ironically, it was the employer in Sweeney that was urging adoption of the Causey mode of review. However, even in Sweeney, supra at 109, Ft. 2, the Court stated that the clearly erroneous standard does not shield findings that are unsupported or arbitrary.

Burdine submits that the Fifth and Seventh Circuit standards clearly apply in this case and that there is no compelling reason to disturb those standards. This standard has evident value in cases such as the instant case where the Trial Court failed to adopt the proper McDonnell Douglas standard. If the Court of Appeals were unable to make an independent review of the facts it would be necessary in every such case to remand for new findings, thus contributing to the already overburdened trial dockets. Use of the Causey standard, eliminates such problems.

Finally, Respondent argues that, as set forth in part II, above, the findings of the Trial Court were properly reversed by the Court of Appeals even under the application of the clearly erroneous standard of Rule 52(a).

CONCLUSION

For the reasons stated herein, Respondent Burdine respectfully prays that the judgment of the United States

Court of Appeals for the Fifth Circuit holding that TDCA discriminated against her because of her sex when it terminated her while retaining and promoting Walz, be affirmed.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, HUBERT L. GILL, Attorney for Respondent, do hereby certify that three true and correct copies of the foregoing Brief for Respondent have been served upon the Attorney for Petitioner by placing same in the United States mail, certified, return receipt requested, addressed to Lonny F. Zwiener, Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 21st day of October, 1980.

Hubert Gill
HUBERT L. GILL